IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

COZEN O'CONNOR, P.C.,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 2:11-cv-45**
	:	
JENNIFER J. TOBITS	:	**District Judge C. Darnell Jones, II**
	:	
and	:	
	:	
DAVID M. FARLEY and JOAN F. FARLEY, h/w,	:	
	:	
Defendants.	:	

RESPONSE OF DAVID AND JOAN FARLEY TO JENNIFER TOBITS' NOTICE OF SUPPLEMENTAL AUTHORITY

The Farleys hereby respond to Jennifer Tobits' Notice of Supplemental Authority (Dkt. 128) regarding *Windsor v. United States*, 833 F.Supp.2d 394 (S.D.N.Y. 2012). *Windsor* was not only wrongly decided but also involved a vastly different situation, a federal estate tax benefit that was unavailable due to the federal Defense of Marriage Act even though out of state same-sex unions were recognized in New York at the time of death. In the instant case, however, Jennifer Tobits' and Ellyn Farley's relationship was not recognized as a marriage in either their state of residence or in Pennsylvania, the choice of law state under the retirement plan. Though the retirement plan could have provided benefits more broadly, the drafters chose to define a spouse as the person that the decedent was married to for a year prior to death and left the definition of "marriage" to Pennsylvania law. Therefore, unlike in *Windsor*, federal DOMA denies no benefit to marriages already recognized in the state. Likewise, Pennsylvania's DOMA does not

categorically prohibit the disposition of benefits to same-sex partners. Instead, such benefits were simply not contemplated under this retirement plan.

Moreover, *Windsor* was wrongly decided in multiple respects. Not only did it utilize an improper level of scrutiny as pointed out by the Bipartisan Legal Advisory Group of the U.S. House of Representatives, but the *Windsor* court incorrectly reasoned that while the government may have an interest in ideal family structures, *see id.* at 404 ("the Court does not disagree that promoting family values and responsible parenting are legitimate governmental goals"), the federal DOMA does not further those ends since marriages are already recognized under state law. Again, this reasoning is inapplicable because Tobits' and Farley's relationship was not recognized as a marriage under either Illinois or Pennsylvania law, and this Court is being asked to change the structure of marriage law for both state and federal government. Moreover, the reasoning is incorrect because even in jurisdictions where a state may recognize a same-sex union, federal DOMA serves an important purpose of continuing to promote marriage between a man and a woman as an ideal environment for childrearing. *See* Farley Br. Dkt. 72, at 21-35; Farley Br. Dkt. 93, at 4-13. There clearly is a debate raging regarding whether marriage is primarily, as historically understood, a procreative union for the good of the children born into that union, or whether it is merely an institution, recognized by the government, involving the affection of two individuals. As we have argued, the federal constitution does not resolve that debate, and the both the state and federal government have a rational basis to retain the opposite-sex definition of marriage. *See id.*

Respectfully submitted,

/s/Randall L. Wenger

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CERTIFICATE OF SERVICE

I, Randall L. Wenger, an attorney herein, certify that I caused this document to be served on all counsel via the Court's CM/ECF system on July 23, 2012.

/s/Randall L. Wenger